

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA BARBERIO,

Plaintiff,

V.

CITY OF BURIEN, et al.,

Defendants.

No. C05-1569P

ORDER ON PENDING MOTIONS

Several motions are currently pending in this matter, including:

- (1) Defendants' motion for dismissal (Dkt. No. 20);
- (2) Plaintiff's motion to request an immediate TPO and TRO against Defendants (Dkt. No. 25);
- (3) Plaintiff's motion to consider amended pleading based on the following facts (Dkt. No. 34);
- (4) Plaintiff's motion for extra time to submit subpoena list and witness list (Dkt. No. 29);
- (5) Plaintiff's motion for extra time to submit transcribed tapes of lower court hearing ZON 05-009 (Dkt. No. 31); and
- (6) Plaintiff's motion to remove Defendants' 2nd lawsuit 06-2-09137-0KNT from Superior Court to U.S. District court and add to C05-1569P for related cases (Dkt. No. 28).

Having reviewed the papers and pleadings submitted by the parties and the balance of the record in this case, the Court GRANTS Defendants' motion for dismissal (Dkt. No. 20). Plaintiff is attempting to pursue claims in this Court that must be adjudicated in state court. Therefore, this case must be dismissed, without prejudice to Plaintiff pursuing her claims in state court. The Court further

1 DENIES Plaintiff's motion to amend her complaint because the proposed amendments would not
 2 permit this Court to adjudicate Plaintiff's claims. Because this case is subject to dismissal, all
 3 remaining motions in this matter are DENIED as moot.

4 The reasons for the Court's order are set forth below.

5 **Background**

6 Plaintiff Pamela Barberio is proceeding *pro se* and *in forma pauperis* in this action. In
 7 September 2005, Plaintiff filed a complaint in this Court. The caption of Plaintiff's complaint reads as
 8 follows:

9 Complaint (1) Petition to remove City of Burien's claim from local jurisdiction (King County
 10 District Court of Washington - Southwest Division) to United States District Court - Western
 District of Washington with jury demand to insure fair hearing

11 Complaint (2) Violation of Code 28 USC 1331; the Constitution of the United States of
 12 America; Amendments to the U.S. Constitution; Declaration of Independence to Include:
 Exploitation, Extortion, Malice Harassment, Abusive and Coercive Conduct, and Misuse of
 Authority.

13 Complaint (3) Petition to invoke a federal protection order against Defendants for: further
 14 acts of malice, harassment, exploitation, extortion, abusive and coercive conduct, and misuse
 of authority.

15 Plaintiff's complaint named the City of Burien as a defendant, along with City of Burien employees
 16 Lisa Marshall (named as an attorney for the City) and Jim Bibby (named as a "code compliance
 17 officer" for the City).

18 At the time Plaintiff filed her complaint in this Court, she and August Barberio were
 19 defendants in a state-court action brought by the City of Burien in King County District Court.¹ The
 20 state-court action was City of Burien v. Adolph Barberio and Pamela Barberio, Case No. ZON 05-
 21 009. In the state-court action, the City of Burien alleged that Plaintiff and Mr. Barberio had violated
 22 the city's trash disposal and nuisance ordinances. From the complaint that Plaintiff filed in this Court,
 23

24
 25 ¹ Although August Barberio was named in the state-court action as a defendant, he did not sign
 the complaint filed by Plaintiff in this Court.

26

1 Plaintiff appeared: (1) to seek permission to remove a state-court action to federal court; (2) to bring
2 claims challenging the constitutionality of Burien’s trash disposal and nuisance ordinances; and (3) to
3 seek a “federal protection order” to bar Defendants from harassing her. Construed liberally, the
4 complaint could also be read as raising tort claims such as outrage or abuse of process.

5 While Plaintiff's complaint was pending in this Court, the state-court action in King County
6 District Court was adjudicated. The King County District Court issued an order dated November 1,
7 2005 in which Plaintiff was found to have failed to comply with provisions of the Burien Municipal
8 Code.

9 In March 2006, the City of Burien filed another complaint for nuisance abatement against
10 Plaintiff in King County Superior Court. The complaint alleges that Plaintiff has not complied with
11 the provisions of the King County District Court's order of November 1, 2005. Plaintiff has filed a
12 motion in this case to remove this second action to this Court. (Dkt. No. 28).

13 Defendants now move for dismissal of this action. Among other arguments, Defendants
14 contend that Plaintiff failed to properly remove any state court actions to federal court and that this
15 Court either lacks jurisdiction or must abstain from exercising jurisdiction over any of Plaintiff's
16 claims.

Analysis

1. Defendants' Motion for Dismissal

19 The Court first analyzes Defendants' motion for dismissal because it addresses the threshold
20 question of whether this Court may adjudicate any of Plaintiff's claims.

A. Removal of State-Court Action to Federal Court

22 First, Defendants argue that Plaintiff did not properly remove the state-court action to federal
23 court. Defendants also maintain that even if Plaintiff had properly removed the state-court action to
24 federal court, this Court would lack jurisdiction over the state-court proceeding.

1 Federal law establishes the requirements for removing a state-court action to federal court.

2 Among other things, federal law provides:

3 A defendant or defendants desiring to remove any civil action or criminal prosecution from a
 4 State court shall file in the district court of the United States for the district and division
 5 within which such action is pending a notice of removal signed pursuant to Rule 11 of the
 6 Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for
 7 removal, together with a copy of all process, pleadings, and orders served upon such
 8 defendant or defendants in such action.

9 28 U.S.C. § 1446(a).

10 Defendants argue that Plaintiff did not comply with the removal requirements. First,
 11 Defendants argue that Plaintiff did not file a “notice of removal” pursuant to 28 U.S.C. § 1446(a),
 12 but instead filed a complaint that she characterized as a “counter lawsuit” against the City of Burien.
 13 Plaintiff’s complaint also includes claims against Lisa Marshall and Jim Bibby, who were not named
 14 as plaintiffs or defendants in the state-court action. Defendants also contend that Plaintiff has not
 15 complied with Local CR 101, which requires a party seeking to remove a case from state court to,
 16 within ten days of removal, to “file with the clerk of this court black-on-white copies of all additional
 17 records and proceedings in the state court, together with his or his count’s verification that they are
 18 true and complete copies of all the records and proceedings in the state court proceeding.”

19 Because Plaintiff is proceeding pro se, the Court construes her pleadings liberally. See
 20 Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987). However, pro se parties must follow the
 21 same rules of procedure as parties represented by counsel. King v. Atiyeh, 814 F.2d 565, 567 (9th
 22 Cir. 1987). In addition, the federal statutes governing removal of actions from state court to federal
 23 court are strictly construed. See, e.g., Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (9th Cir. 1998)
 24 (“removal statutes must be strictly construed”).

25 As Defendants note, Plaintiff did not file a “notice of removal,” but instead filed a new
 26 complaint that she characterized as a counter lawsuit and which named two defendants (Lisa Marshall
 27 and Jim Bibby) who were neither plaintiffs nor defendants in the state-court action. Nothing in 28

1 U.S.C. § 1446(a) provides that a state-court proceeding may be removed by filing an entirely new
 2 complaint in federal court that requests removal of the state-court action. In addition, Plaintiff's
 3 complaint does not state any colorable grounds for removing the state court action to federal court.
 4 Although Plaintiff asserted in her complaint that she could not get a fair and impartial trial in state
 5 court, such allegations are not grounds for removing a state court action to federal court.² It should
 6 also be noted that the civil cover sheet that Plaintiff was required to file in this Court directed Plaintiff
 7 to indicate the "origin" of the case. Plaintiff checked a box on the civil cover sheet indicating that this
 8 was an "original proceeding," rather than a box indicating that the case was "Removed from State
 9 Court." Under these circumstances, the Court does not construe the complaint Plaintiff filed in this
 10 Court to constitute an adequate notice of removal under § 1446(a).

11 Even if the Court were to regard Plaintiff's complaint as an adequate notice of removal under
 12 § 1446(a), the Court would plainly lack subject matter jurisdiction over the state-court action. This
 13 Court cannot exercise jurisdiction over complaints filed in state court between citizens of the same
 14 state unless the state-court complaint raises questions under federal law or the United States
 15 Constitution. See 28 U.S.C. § 1331. Here, the complaint filed by the City of Burien in King County
 16 District Court against Plaintiff only alleges violations of the Burien Municipal Code. The City's
 17 complaint did not state any claims arising under the Constitution or laws of the United States. As a
 18 result, Plaintiff cannot remove the state-court action to federal court because the City did not raise
 19 any federal claims against Plaintiff.

20 In her complaint in this Court, Plaintiff alleges that Burien's ordinances violate the United
 21 States Constitution. However, even if those allegations could be regarded as counterclaims to the
 22

23 ² 28 U.S.C. § 1443(1) permits removal of cases brought "[a]gainst any person who is denied or
 24 cannot enforce in the courts of such State a right under any law providing for the equal civil rights of
 25 citizens of the United States, or of all persona within the jurisdiction thereof." However, the Supreme
 Court has held that this provision only authorizes removal of state court cases involving the alleged denial
 of racial equality. Johnson v. Mississippi, 421 U.S. 213, 218 (1975). Plaintiff's complaint in this case
 does not allege denial of racial equality.

26

1 City's state-court complaint, it is well-established that a defendant in a state-court action cannot
 2 remove a case to federal court simply because the state-court defendant raises counterclaims under
 3 federal law. See, e.g., Rath Packing Co. v. Becker, 530 F.2d 1295, 1303 (9th Cir. 1975)
 4 ("Removability cannot be created by defendant pleading a counter-claim presenting a federal
 5 question.").

6 Ordinarily, a state-court case that is improperly removed to federal court must be remanded to
 7 state court. See 28 U.S.C. § 1446(c). Here, however, the Court finds that Plaintiff did not effect
 8 removal of the state-court action to federal court because Plaintiff's complaint in this Court was not a
 9 sufficient notice of removal filed pursuant to 28 U.S.C. § 1446(a). As such, remand is not necessary.³
 10 Therefore, the Court will dismiss Plaintiff's complaint to the extent it may be construed as an
 11 ineffective attempt to remove a state-court action to federal court.

12 B. Constitutional Claims

13 Plaintiff's complaint also asserts that provisions of the Burien Municipal Code (BMC) are
 14 invalid under the United States Constitution. In particular, Plaintiff alleges:

15 BMC 8.15.110 AND BMC 8.45.020(9) I allege, as written, violate the Constitution of the
 16 United States, Amendments to the Constitution and lacks proper parameters to insure fair and
 just application of the ordinance.

17 (Dkt. No. 3-1 at 4). Defendants argue that any constitutional claims asserted in Plaintiff's complaint
 18 must be dismissed because this Court is required to abstain from deciding such matters under the
 19 Younger abstention doctrine. See Younger v. Harris, 401 U.S. 37 (1971). The Court agrees.

20 The Younger abstention doctrine "is based on a strong policy of avoiding federal interference
 21 in pending state proceedings enforcing state public policy." Gatrell Constr. Inc. v. Aubry, 940 F.2d
 22 437, 441 (9th Cir. 1991). Under the Younger doctrine, a federal court must abstain from exercising

23
 24 ³ In any case, the Ninth Circuit has held that there is a futility exception to the rule that
 25 improperly removed federal actions must be remanded to state court. See Bell v. City of Kellogg, 922
 F.2d 1418, 1424-25 (9th Cir. 1991). Here, it would be futile to remand the state court action to the King
 County District Court because the case has already been adjudicated by the state court.

26

1 its jurisdiction in civil proceedings if “(1) there are ongoing state judicial proceedings, (2) the
 2 proceedings implicate important state interests; and (3) there is an adequate opportunity in the state
 3 proceedings to raise federal questions.” Id. “When the case is one in which the Younger doctrine
 4 applies, the case must be dismissed.” H.C. v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000).

5 Here, there are ongoing state judicial proceedings between Plaintiff and the City of Burien
 6 regarding the ordinances that Plaintiff alleges to be unconstitutional. At the time that Plaintiff filed
 7 her complaint in this Court, the City of Burien was suing her in state court for alleged violations of
 8 the Burien ordinances. While it appears that the original state-court action has now been adjudicated,
 9 the City of Burien has initiated a second action against Plaintiff in King County Superior Court raising
 10 similar complaints about Plaintiff’s compliance with nuisance and trash removal ordinances. Plaintiff
 11 has also asked this Court to intervene in the second state court action by filing a motion to remove
 12 that case to this Court and to enjoin the proceeding. See Dkt. No. 28. As a result, this Court would
 13 improperly interfere with ongoing state-court proceedings by exercising jurisdiction over Plaintiff’s
 14 constitutional claims.

15 The state-court proceedings also implicate an important state interest. The proceedings
 16 involve Burien’s nuisance abatement laws, a type of proceeding that implicates important state
 17 interests for the purposes of Younger abstention. See, e.g., Woodfeathers, Inc. v. Washington
 18 County, Oregon, 180 F.3d 1017, 1021 (9th Cir. 1999) (“Civil actions brought by a government entity
 19 to enforce nuisance laws have been held to justify Younger abstention.”).

20 Finally, there should be an adequate opportunity in the state proceedings for Plaintiff to raise
 21 federal questions regarding the constitutionality of Burien’s ordinances. If Plaintiff believes the
 22 Burien ordinances are unconstitutional, there is no apparent reason why she cannot raise that
 23 argument in the pending state court action.

24 As a result, the Younger doctrine requires this Court to abstain from adjudicating Plaintiff’s
 25 claims regarding the constitutionality of the Burien ordinances challenged in Plaintiff’s complaint.

26

1 Therefore, Plaintiff's constitutional claims must be dismissed, without prejudice to Plaintiff's ability to
 2 raise such claims in the state court proceedings.

3 C. Request for "Federal Protection Order"

4 Defendants do not directly address Plaintiff's third complaint, which is labeled as a "Petition
 5 to Invoke a Federal Protection Order Against City of Burien, Lisa Marshall, and Jim Bibby for further
 6 malice harassment as threatened in the [Burien] claim." However, this claim is subject to dismissal by
 7 the Court under 28 U.S.C. § 1915(e)(2)(B)(ii), which provides that a federal district court shall
 8 dismiss claims filed by a plaintiff proceeding *in forma pauperis* if the action fails to state a claim on
 9 which relief may be granted. Here, Plaintiff's request for a "Federal Protection Order" does not state
 10 a claim for which this Court may grant relief. Plaintiff's request for a protection order appears to be
 11 based on provisions of Washington state law that permit victims of harassment or domestic violence
 12 to obtain protection orders. See RCW 10.14 and 26.50. Unlike Washington state law, there is no
 13 federal statute that authorizes the issuance of a "Federal Protection Order." Therefore, this claim will
 14 be dismissed for failure to state a claim on which relief may be granted. This dismissal is without
 15 prejudice to Plaintiff seeking protection orders as authorized by Washington law in Washington state
 16 courts.⁴

17 2. Remaining Motions

18 Plaintiff has filed a motion to amend her complaint. (Dkt. No. 34). However, even if the
 19 Court were to grant Plaintiff leave to amend her complaint, this case would still be subject to
 20 dismissal because the proposed amendments would not permit this Court to adjudicate her claims.

22 4 Plaintiff also requests damages against each Defendant. The damages sought by Plaintiff appear
 23 to be based on allegations of exploitation, extortion, malicious harassment, abusive and coercive conduct,
 24 and misuse of authority. This could be construed as raising a number of state-law tort claims, such as
 25 outrage or abuse of process. However, such tort claims would have to be pursued in state court, rather
 26 than federal court, since all parties are citizens of Washington state. In addition, as the City notes,
 Washington law requires a party seeking tort damages against a municipality to file a claim for damages
 with the municipality before filing suit. See RCW 4.96.010 - 020.

1 Therefore, the Court denies the motion to amend on futility grounds. See, e.g., Johnson v. Buckley,
2 356 F.3d 1067, 1077 (9th Cir. 2004) (“Futility alone can justify the denial of a motion to amend”).

3 Because this case is subject to dismissal, the Court denies all remaining motions filed by
4 Plaintiff as moot.

5 **Conclusion**

6 For the reasons discussed above, Defendants’ motion for dismissal (Dkt. No. 20) is
7 GRANTED and this matter is hereby DISMISSED. The claims that Plaintiff seeks to pursue in her
8 complaint must be adjudicated in state court. The Court further DENIES Plaintiff’s motion to amend
9 her complaint (Dkt. No. 34) because this case would still be subject to dismissal even if leave to
10 amend were granted. All other pending motions in this matter are DENIED as moot.

11 The clerk is directed to send copies of this order to Plaintiff and to all counsel of record.

12 DATED: August 3, 2006.

13 s/Marsha J. Pechman
14 Marsha J. Pechman
15 United States District Judge
16
17
18
19
20
21
22
23
24
25
26